OHI America, Inc. ***and*** **Kimberly Lewis** ***and*** **Vanesca R. McDaniel.** Cases 9–CA–29275–2, 9–CA–29275–1, and 9–CA–29445

November 24, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On March 30, 1993, Administrative Law Judge Robert T. Wallace issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

We agree with the judge's finding that the Respondent violated Section 8(a)(3) and (1) of the Act by issuing a written disciplinary warning to employee Kimberly Lewis on January 20, 1992. The judge, however, failed to analyze the issuance of this warning expressly under the Board's *Wright Line* standard.[2]

The January 20 warning cited Lewis for both unauthorized posting of a notice concerning a union meeting and ''insubordinate behavior.'' The judge found that Lewis had engaged in misconduct by posting the notice on the wall of the employee breakroom because she had breached the Respondent's rule requiring employees to obtain prior permission of the personnel manager before posting notices on the Respondent's premises. The judge, however, found that the Respondent's inclusion of ''insubordination'' in the warning ''was prompted by animus toward Lewis for her union activities and tainted the entire warning.''

Under the *Wright Line* test, to prove a violation of the Act turning on employer motivation, the General Counsel must establish a prima facie case that animus against union activity or other protected conduct was at least a motivating factor in the action in question. The employer may escape liability for its action either by rebutting the prima facie case—i.e., disproving one or more of the critical elements of that case—or by establishing as an affirmative defense that it would have taken the same action even in the absence of the employee's protected conduct.

The facts set forth in the judge's decision clearly establish that the General Counsel made a showing sufficient to support the inference that protected conduct was a motivating factor in the Respondent's issuance of the January 20 warning to Lewis. In this regard, the record demonstrates that Lewis was an outspoken leader of the Union's organizing effort among the Respondent's employees, and that the Respondent harbored animus against Lewis because of that activity.[3] Further, the January 20 written warning occurred during a period when Lewis was particularly active on behalf of the Union. Until Lewis contacted the Union and began her organizing activity, she was considered by the Respondent to be an exemplary employee, as was reflected in the evaluation that she received in October 1991. There is no evidence that Lewis had been subject to any discipline before the January 20 warning.

The judge found, and we agree, that the evidence is insufficient to support the Respondent's contention that Lewis had been insubordinate approximately 2 weeks before the January 20 warning. Thus, we are left with Lewis' unauthorized posting of the notice regarding the union meeting as the only misconduct that might have warranted issuance of the warning. Based on the record, however, we find that the Respondent failed to establish that it would have issued the January 20 written warning to Lewis even in the absence of her union activities. The Respondent made no showing that any other employee had been disciplined for posting material on the wall of the breakroom, or anywhere else on the Respondent's property. In these circumstances, we conclude that the Respondent has not met its burden under *Wright Line* of demonstrating that it would have given this warning to Lewis even if she were not an open and outspoken union supporter.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, OHI America, Inc., Frankfort, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the judge's findings.

[2] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). We also affirm the judge's findings that disciplinary warnings issued to Lewis on March 6, 1992, and to Vanesca McDaniel on January 22, 1992, violated Sec. 8(a)(3) and (1). Although the judge did not explicitly cite to or rely on *Wright Line* in finding these warnings unlawful, the analytical framework that he used in considering these warnings fully comports with the *Wright Line* standard.

[3] We affirm the judge's findings that the Respondent violated Sec. 8(a)(1) by threatening Lewis with the loss of promotions and unspecified reprisals because of her support of the Union.

[4] See *Hicks Oils & Hicksgas*, 293 NLRB 84, 85 (1989). (''Under *Wright Line*, an employer cannot carry its burden of persuasion by merely showing that it had a legitimate reason for imposing discipline against an employee, but must show by a preponderance of the evidence that the action would have taken place even without the protected conduct.'')

James E. Horner, Esq., for the General Counsel.
James U. Smith III and *Andrew J. Russell, Esqs*., for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT T. WALLACE, Administrative Law Judge. The original charges were filed January 28, 1992,[1] and a complaint issued March 13. The charge in Case 9–CA–29445 was filed March 25. The cases were the subject of a consolidated complaint issued May 8, and they were heard together on June 24 in Frankfort, Kentucky. At issue is whether Respondent threatened and disciplined employees Lewis and McDaniel in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT/ANALYSIS

I. JURISDICTION

The Respondent, a corporation, makes automobile parts at its facility in Frankfort, where it annually ships goods valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the United Automobile Workers of America is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Kimberly Lewis*

Lewis was hired in October 1990, and she received her first evaluation about 1 year later. Therein, she received high ratings in nearly all categories, including work quality and quantity. The rater was her immediate supervisor (Elaine Osbourne) who, in handwritten notes, praised her for, among other things, ''working well with others,'' ''using time wisely,'' and being a ''very good team-mate.'' Both the production manager (Phillip Roseberry) and personnel manager (James Jones) subscribed to that evaluation.

While on break in the breakroom on Friday, January 3, with about 15 to 20 employees present, Lewis expressed dissatisfaction with working conditions and opined that things would be different if employees were represented by a union. Within the hour, three employees (Nagle, Hood, and Baader) approached Osbourne and told her what Lewis had said. Osbourne promptly called Lewis to the office (something that had never happened before) and told her a lot of promotions would be opening up soon and that talking about unionism could hurt her in that regard. When Lewis was noncommittal, Osbourne asked whether she was aware of her rights under company policies. Lewis replied, ''Yes'' and the interview ended.

Although Osbourne, an admitted supervisor, claims only to have asked Lewis if she was aware of the rules regarding solicitation, I find more probable, and credit, Lewis' account. I find the incident intimidating and unlawful, as alleged.

On the following Monday, Lewis called the local office of the United Automobile Workers and inquired about unionization. A UAW representative returned her call on Wednesday morning and told her he'd talk with employees at a meeting on January 11 and, in the afternoon about an hour before her shift began, Lewis distributed fliers announcing the meeting in the Company's parking lot. Later that day she was again called into the office where she met with Manager Roseberry and Osbourne. Roseberry told her that he had received several complaints that she was talking about the Union ''on the floor,'' i.e., during working time. When Lewis denied having done so, Roseberry told her that he knew what activities took place and advised her to consider herself as having been warned.

Roseberry did not testify, and there is no direct testimony that Lewis acted improperly.[2] I credit her denial and find that the incident entailed wrongful intimidation by threat of unspecified reprisals, as alleged.

On January 9 signs were posted at the employees' parking lot gates bearing the legend, ''Notice, Private Property, No Soliciting'' and, on the following day, employees received with their paychecks a letter wherein the president of the Company (Tom Lingerman) expressed firm opposition to unionization.

Lewis continued to attend union meetings, distributed union cards and fliers in the lots and breakroom, and became a member of the union organizing committee.

At about 8:30 p.m. on January 20, Lewis affixed a 2-by-1-1/2 foot poster on a blank wall in the breakroom with two thumbtacks. The poster read as follows:

UNION MEETING !!
Tuesday January 21st
1:00 o'clock at
BEST WESTERN

Don't let anyone lie, threaten or
try to scare you about going to a
meeting. You have the *right*
to hear your rights and fight for them.

On the opposite wall were a number of company postings, including notices concerning ''Equal Employment Opportunity, Wage and Hours, and Safety.'' The applicable company rule provides that notices are not to be posted or removed without written permission of the personnel manager (James Jones). Lewis had not sought permission.

At 9 p.m., Supervisor Osbourne called Jones at his home and told him about the posting. Immediately thereafter he returned to the plant where he participated in preparing a written warning to Lewis relative to the unauthorized posting. He also included in the warning a citation for ''insubordinate behavior.'' At 10 p.m., after having Roseberry and Osbourne sign the warning, he called Lewis to his office where, with Osbourne present, he served it. Although admitting posting the sign, Lewis vigorously denied having been insubordinate and pressed him for details. Jones said he had been told she'd failed to follow her team leader's orders but declined

[1] All dates are in 1992 unless otherwise indicated.

[2] Osbourne did not refer to the meeting in her testimony. And she did not claim any knowledge of improper conduct of Lewis.

to provide any other information. Promptly on leaving the office, Lewis went to her team leader (Denise Baader) and asked when she'd failed to follow instructions. Baader replied, ''Never.''[3]

I find that Lewis engaged in misconduct by posting the sign on the wall. There is no evidence that the Company allowed employee-generated notices to be posted in that manner. Indeed, a witness for the General Counsel testified that he'd never heard of any employee doing so. The fact that employees on occasion were allowed to post items such as ''thank you'' notes on bulletin boards is without significance because Lewis' posting was on a wall and, in any event, there is no showing that postings were allowed without prior permission.

Jones, however, did not choose to ground the warning solely on that transgression. Instead, he included ''insubordination'' as a further reason for the discipline. Because he gave Lewis no details and provided no reason on this record as to why he waited nearly 2 weeks to mention the matter, I find the inclusion was prompted by animus toward Lewis for her union activities and tainted the entire warning.

Lewis states that during the disciplinary interview on January 20, Jones also mentioned the ''Private Property, No Soliciting'' signs which had be installed at entrances to employee parking lots on January 9. In itself the notice is permissible because an employer is free to bar unauthorized persons (strangers) from its property at any time, and that right exists even when the posting is in response to a union organizational drive. Lewis, however, claims that at the interview Jones asked if she had seen the signs and then told her she could be terminated for distributing fliers in the lots. For his part, Jones says he simply told Lewis the Company preferred that she didn't distribute there because of a litter problem. Thereafter, Lewis continued regularly to distribute in the lots prior to commencement of her shift and was never warned or punished for doing so. In this instance, I view Lewis' claim as improbable and credit Jones. Accordingly, I find no violation of her right as an employee to distribute union materials in the parking lots while off duty. Paragraph 6 of the complaint will be dismissed.

On March 6 Jones again called Lewis to his office. There, he handed her another written warning for ''interferring [sic] with the work of others.'' The warning does not state when the alleged offense occurred, and Jones declined to provide any information including names of the several employees who allegedly complained.

At trial, Jones reiterated the claim that a number of employees had complained but identified only one, John Spencer.[4] He also testified that Spencer, on March 2, told him Lewis had repeatedly interrupted him at work by talking about and urging him to support the Union. Spencer, however, denied that Lewis had bothered him on the job[5] and that he had complained to Jones that she had done so.[6] I credit both Lewis and Spencer and find that issuance of the second warning represents another example of Lewis' being unlawfully harassed for her activities on behalf of the Union.

B. *Vanesca McDaniel*

McDaniel was hired in June 1990 and, like Lewis, she received high praise for the quality and quantity of her work when she received her first evaluation in mid-November by her then supervisor, Donald Polly. His only negative entry was under the category ''ABILITY TO WORK WITH OTHERS'' where he placed a check next to the typed comment (the second of five): ''Does not promote teamwork. Poor use of tact and diplomacy. Strained relationship with T/L [team leader Patsy Burgin, a nonsupervisor].''[7] However, in a handwritten comment, he added: ''Situation has improved since move to . . . [another team]. Keep it up!!'' At an other part of the evaluation, Polly indicated that McDaniel had helped in training new employees. Managers Roseberry and Jones each signed the evaluation.

On January 11, McDaniel attended the first union meeting, signed an authorization card, and became a member of the organizing committee. Thereafter, she regularly distributed union literature in the parking lots and in the breakroom and, on occasion, when other employees came to her work station inquiring about the Union, she answered their questions.

Around 9 a.m. on January 22, McDaniel's newly appointed supervisor (group leader Burgin) told her that several supervisors and hourly workers complained that while on break she had been bothering ''other people'' who were working. Burgin did not say when the complaints were received, who had complained, and why they felt bothered.[8]

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[3] Jones produced a note dated January 8, purportedly in Lewis' personnel file on January 20, in which Baader and Osbourne cited Lewis for shrugging her shoulders and continuing to leave the work area on that day at 11:50 p.m. (10 minutes before the end of her shift) after an unnamed person asked her to restock. Neither Baader nor Osbourne testified about the matter. The note, even assuming it was in Lewis' personnel file on January 20, provides an insufficient basis for concluding that a significant breach of discipline occurred.

[4] Jones claims he told Lewis that Spencer was one of the complainants when he disciplined her on March 6.

[5] Spencer recalls that Lewis once asked him to attend a union meeting and that he declined. There is no reason to suppose that the latter exchange took place during worktime or even at the plant.

[6] The flavor of Jones' interview with Lewis is captured in the following exchange between Respondent's counsel (RC) and Spencer (SP):

> RC: The company was concerned about the problems you had expressed about your own job, isn't that correct?
>
> SP: With the machine breaking down and trouble we were having.
>
> RC: And Jones asked you specifically about other problems you were having on the job?
>
> SP: He directed the attention towards Kim [Lewis].
>
> RC: He expressed concern to you about your ability to perform your job free of harassment, or free of being bothered by other employees about things about which you chose not to be bothered; isn't that correct?
>
> SP: And I told him that she was not bothering me and she did her work. And that's where [Jones' account of my] . . . statement has been turned, and that's why I'm down here. It's wrong. It's wrong.

[7] The first typed comment (not chosen) read as follows: ''Arouses resentment of co-workers. Ineffective when working with others; fails to use tact and diplomacy. Unable to work effectively under supervision. Tests or questions work rules.''

[8] Sometime during the day, Burgin put a note in McDaniel's personnel file stating that an hourly employee (unidentified) had complained to her about being stopped and bothered by McDaniel while he was getting parts, and in a separate note (also dated January 22) Burgin recorded what she had told McDaniel at 9 a.m. Also in

Continued

Unaware that discipline was contemplated, and not wishing to argue, McDaniel replied, ''Okay'' and continued to work. I do not view that comment as an admission of wrongdoing. Like other employees, McDaniel often engaged in chit-chat on the floor about sports and personal matters and, at best, the '' Okay'' meant she accepted the possibility that sometime she may inadvertently have caused offense to someone.

Later that day McDaniel was told to go to the office. There, with Burgin present, Production Manager Roseberry repeated Burgin's claim that several supervisors and employees had complained of being bothered, and handed her a written warning for ''Disrupting the work of others, [and] creating an undesirable work environment.'' In response to McDaniel's inquiry as to who had complained, Roseberry told her he was not free to divulge names but that people with whom she currently worked on the line had complained. Asked ''How many?,'' he replied, ''Numerous.'' Pressed again as to whether it was 2, 10, or 12, he answered, ''More than one.'' And as to what had bothered others, Roseberry declined to be specific. Instead he told her she had been ''talking about things that were making people uncomfortable.''

Here too, I am not persuaded that the warning was issued for reasons other than to punish an employee for actively supporting unionization and to deter continuance of such activity. Respondent made no attempt to show that Daniel promoted the Union during working time. Instead, it claims she had a problem working with others and ''bothered'' them. However, the record is devoid of credible evidence as to when, who, and how she did so.

CONCLUSION OF LAW

Respondent violated the Act in the particulars and for the reasons stated above, and it is not shown to have done so in any other respect. Those unfair labor practices and each of them have affected, are affecting, and unless permanently restrained and enjoined will continue to affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, OHI America, Inc., Frankfort, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening loss of promotions and unspecified reprisals for supporting the United Automobile Workers of America or any other union.

(b) Issuing disciplinary warnings to inhibit, deter, or prevent employee support for the United Automobile Workers of America or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from its files any reference to the unlawful warnings given to Kimberly Lewis on January 20 and March 6, 1992, and to Vanesca McDaniel on January 22, 1992, and notify them in writing that this has been done and that the warnings will not be used against them in any way.

(b) Post at its facility in Frankfort, Kentucky, copies of the attached notice marked ''Appendix.''[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

McDaniel's file were notes dated December 4 and 10, 1991, in which Burgin states that another hourly worker complained about being told how to do her job by McDaniel. There is no indication that McDaniel had ever been advised of the existence of those documents or that she had been disciplined or even counseled about the matters recorded in December.

[9] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with loss of promotions and unspecified reprisals for supporting the United Automobile Workers of America or any other union.

WE WILL NOT give you disciplinary warnings to inhibit, deter, or prevent you from supporting the United Automobile Workers of America or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL remove from our files any reference to the unlawful warnings we gave to Kimberly Lewis on January 20 and March 6, 1992, and to Vanesca McDaniel on January 22, 1992, and notify them in writing that this has been done and that the warnings will not be used against them in any way.

OHI AMERICA, INC.